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CAMERA PRODUCTS, INC.; MARTY  
OPPENHEIMER

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

VOICE INTERNATIONAL, INC., a  
California corporation; DAVID  
GROBER, an individual,

Plaintiff,

v.

OPPENHEIMER CINE RENTAL, LLC,  
a Washington corporation;  
OPPENHEIMER CAMERA  
PRODUCTS, INC., a Washington  
corporation; MARTY OPPENHEIMER,  
an individual; JORDAN KLEIN, SR., an  
individual; JORDAN KLEIN, JR., an  
individual; JOHN DANN, an individual;  
MAKO PRODUCTS, an unknown  
entity; OCEANIC PRODUCTION  
EQUIPMENT, LTD., a Bahamian  
company; and DOES 1-10, inclusive,

Defendants.

Case No. 2:15-cv-08830-JAK-KS

Hon. John A. Kronstadt

**THE OPPENHEIMER DEFENDANTS'  
MOTION IN LIMINE TO EXCLUDE  
EVIDENCE AT TRIAL REGARDING  
PLAINTIFFS' ALLEGED DAMAGES AND  
FOR MONETARY SANCTIONS**

**DECLARATION OF ASHE P. PURI AND  
[PROPOSED] ORDER SUBMITTED  
UNDER SEPARATE COVER**

Hearing Date: September 30, 2019  
Time: 1:30 p.m.  
Courtroom: 10B

Final Pretrial Conf.: September 30, 2019  
Trial Date: October 15, 2019

**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE THAT** on September 30, 2019, at 1:30 p.m., or as soon thereafter as counsel may be heard in Courtroom 10B of the United States Courthouse located at 350 W. First Street, Los Angeles, California 90012, Defendants Oppenheimer Cine Rental, LLC, Oppenheimer Camera Products, Inc. and Marty Oppenheimer (collectively, the “Oppenheimer Defendants”) will and hereby do move for an order to preclude Plaintiffs Voice International, Inc. and David Grober (collectively, “Plaintiffs”) from presenting any argument, evidence or witness at trial on the issue of alleged damages against the Oppenheimer Defendants and for monetary sanctions.

This motion is made following a conference of counsel pursuant to this Court’s Standing Order (Dkt. Nos. 13, 295), which took place on September 9, 2019. *See* supporting Declaration of Ashe P. Puri at ¶ 2. This motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the supporting Declaration of Ashe Puri, the [Proposed] Order and such further evidence and arguments that the Court may consider.

Dated: September 16, 2019

FOX ROTHSCHILD LLP

By: /s/ Ashe P. Puri

James E. Doroshow

Ashe P. Puri

Attorneys for Defendants OPPENHEIMER  
CINE RENTAL, LLC; OPPENHEIMER  
CAMERA PRODUCTS, INC.; MARTY  
OPPENHEIMER

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Defendants Oppenheimer Cine Rental, LLC, Oppenheimer Camera Products, Inc. and Marty Oppenheimer (collectively, the “Oppenheimer Defendants”) hereby move *in limine* for an order precluding Plaintiffs Voice International, Inc. and David Grober (collectively, “Plaintiffs”) from presenting any argument, evidence or witness at trial on the issue of alleged damages arising from their claim of patent infringement against the Oppenheimer Defendants, and for monetary sanctions.

This relief is clearly warranted. Federal Rule 37 states that “[i]f a party fails to provide information as required by Rule 26(a) or 26(e), the party is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). In this case, Plaintiffs never served any Rule 26(a)(1) Initial Disclosures setting forth a computation of their damages; they never provided any damage expert disclosure under Federal Rule 26(a); and they never answered Defendants’ interrogatory asking Plaintiffs to identify the basis of their damage claims and all theories, calculations and evidence supporting their alleged damage claim against any Defendant (as well as never supplementing their “response” to what damage they were claiming as required under Rule 26(e)). As such, Plaintiffs have provided absolutely no evidence or information whatsoever during discovery or otherwise to support any damage claim against the Oppenheimer Defendants.

Fact and expert discovery has now long been closed. With less than a month until trial, the Oppenheimer Defendants still have no information about which theory (or theories) of any alleged damages, calculations, or evidence that Plaintiffs intend to rely upon to prove damages.<sup>1</sup> At the same time, Plaintiffs cannot show that they were

<sup>1</sup> Even as of this late date, Plaintiffs still cannot decide which theory (or theories) of damages they now intend to pursue against the Oppenheimer Defendants. Most recently (after the close of discovery), Plaintiffs sent multiple different versions of their jury instructions to the Oppenheimer Defendants with completely different damage instructions and theories. One version sent by Plaintiffs included jury instructions limited

1 “substantially justified” in withholding any evidence or arguments supporting any  
 2 specific damage claim during discovery (especially when the Oppenheimer Defendants  
 3 were requested to and had produced all of the sales records for the Accused Product more  
 4 than three and one half years ago to Plaintiffs. Plaintiffs had every opportunity to  
 5 disclose their damage contentions since they filed this case nearly four-years ago, and  
 6 they failed to do so. As such, with less than a month before trial, it would be improper  
 7 and highly prejudicial to allow Plaintiffs to present any damage theories, calculations or  
 8 evidence for the first time at trial.

## 9 **II. BACKGROUND**

10 On November 12, 2015, Plaintiffs filed their Complaint against the Oppenheimer  
 11 Defendants alleging infringement of U.S. Patent No. 6,611,662 (the “‘662 Patent”).  
 12 Plaintiff David Grober (“Grober”) has alleged that he is the inventor and owner of the  
 13 ‘662 patent and holds all rights and interest thereto. *See* Dkt. No. 313, at ¶ 13. Plaintiff  
 14 Voice International (“Voice Int’l.”) has alleged that it has an exclusive license from  
 15 Grober to commercialize the ‘662 Patent. *See id.*

16 Plaintiffs have accused Defendant Oppenheimer Cine Rental of willful patent  
 17 infringement (Claim 1) and induced patent infringement (Claim 2) arising from its rentals  
 18 of the accused MakoHead product (“Accused Product”). Along with Defendant  
 19 Oppenheimer Cine Rental, Plaintiffs have asserted claims of willful and induced  
 20 infringement against Defendant Oppenheimer Camera Products alleging that Defendant  
 21 Oppenheimer Camera Products was “involved” in renting and distributing the Accused  
 22 Product. *See id.* at ¶ 7. For their part, Defendant Oppenheimer Camera Products has  
 23 repeatedly denied renting or distributing the Accused Product, as well as any other use of  
 24 the Accused Product. *See* Declaration of Ashe Puri in Support of Defendants’ Motion in  
 25 Limine (“Puri Decl.”), Ex. A.

26  
 27 to a lost profits damage award. The second version sent by Plaintiffs included  
 28 instructions seeking both a lost profits and a reasonable royalty award. *See*  
 accompanying Declaration of Ashe P. Puri (“Puri Decl.”), at **Exhibits I and J.**

1 In addition, Plaintiffs have asserted claims for willful and induced infringement  
 2 against Defendant Marty Oppenheimer, the owner of Oppenheimer Cine Rental and  
 3 Oppenheimer Camera Products. In doing so, Plaintiffs allege that Mr. Oppenheimer was  
 4 “personally involved in, coordinating, supporting and/or directing the alleged infringing  
 5 activities individually and through Oppenheimer Cine and Oppenheimer Camera.” *See id.*  
 6 at ¶ 8. On his part, Mr. Oppenheimer has repeatedly denied any personal involvement  
 7 relating to any rental, distribution or other use of the Accused Product, and that any  
 8 involvement any corporate entity may have had in any alleged rental or other use of the  
 9 Accused Product involved Mr. Oppenheimer solely in his capacity as an officer of  
 10 Oppenheimer Cine Rental. Thus, under the corporate shield doctrine, Mr. Oppenheimer  
 11 will show that he cannot possibly be personally liable for any corporate activities by  
 12 Oppenheimer Cine Rental where, as here, his involvement in any rental of the Accused  
 13 Product was limited solely to his involvement as a corporate officer for Oppenheimer  
 14 Cine Rental.

15 On May 23, 2016, Defendant Oppenheimer Cine Rental produced to Plaintiffs a  
 16 complete set of its sales records involving the Accused Product. *See* Puri Decl. at ¶ 6,  
 17 **Exhibit A**. As shown in its sales records (*id.*), Defendant Oppenheimer Cine Rental  
 18 merely earned a gross profit of \$69,062.00 from renting the Accused Product between the  
 19 period of July 2, 2009 to February 5, 2016. In doing so, Oppenheimer Cine Rental  
 20 received total revenues of \$183,013.00 from renting the Accused Product (and other  
 21 unrelated equipment) out of which \$103,608.00 was paid by Oppenheimer Cine Rental to  
 22 rent the Accused Product from its suppliers, Mako Products (now defunct) and Defendant  
 23 Oceanic Production Equipment, Ltd.<sup>2</sup> (“OPEL”). *See id.*

24 Although Defendants Marty Oppenheimer and Oppenheimer Camera Products  
 25 have repeatedly denied any personal involvement in the sale, distribution or any other  
 26 alleged use of the Accused Product, and given the small amount of rentals and revenue

27 <sup>2</sup> In addition, out of the \$183,013.00 in revenues, Oppenheimer Cine Rental’s customers  
 28 paid \$10,343.00 for equipment unrelated to the Accused Product (e.g., other accessories  
 and components).

1 Oppenheimer Cine Rental made and received from any use of the Accused Product,  
 2 Plaintiffs nevertheless have steadfastly refused to dismiss the Oppenheimer Defendants  
 3 from this lawsuit. Instead, Plaintiffs have made this case onerous and highly expensive  
 4 by forcing those Defendants to incur significant, time and expense responding to a large  
 5 volume of discovery requests<sup>3</sup> served by each Plaintiff, including being forced to defend  
 6 multiple discovery motions preceded by several meet and confer letters. *See* Puri Decl. at  
 7 ¶ 7. Moreover, to date, the Oppenheimer Defendants have already incurred fees far  
 8 exceeding Oppenheimer Cine Rental's profits on the Accused Product, and thus  
 9 surpassing any damage that Plaintiffs could ever possibly be able to recover in this  
 10 lawsuit. *See id.*

11 In contrast, Plaintiffs have repeatedly refused to divulge any information regarding  
 12 the basis of their alleged damage claims and theories against any of the Oppenheimer  
 13 Defendants, even after receiving all of the requested financial data from Oppenheimer  
 14 Cine Rental more than three-and-one-half-years ago.<sup>4</sup> At the same time, at the outset of  
 15 this litigation, Plaintiffs never served any Rule 26(a) Initial Disclosures which  
 16 specifically required them to disclose their "computation of each category of damages."<sup>5</sup>  
 17 *See* Puri Decl. at ¶ 8. Plaintiffs as noted have refused to answer an interrogatory  
 18 disclosing the basis for damage, including specifically asking them to set forth their  
 19 alleged theories, calculations and evidence they intend to rely upon for any alleged

20 <sup>3</sup> In total, Plaintiffs served the Oppenheimer Defendant with more than 10 separate sets of  
 21 discovery requests between the period of February 1, 2016 to January 3, 2017. *See* Puri  
 Decl. at ¶ 7.

22 <sup>4</sup> In the parties' Rule 26(f) Report, Plaintiffs stated merely that they were seeking "lost  
 23 profits and actual damages" (Dkt. No. 21 at p. 6) without divulging any further  
 24 information about the nature and scope of any alleged damages Plaintiffs might be  
 25 seeking. More recently (as explained further below), Plaintiffs have now belatedly  
 26 included a jury instruction claiming that they are entitled to a reasonable royalty award.  
 Thus, to this day, it still remains entirely unclear what theory (or theories) of damages  
 that Plaintiffs are seeking to advance in this action, especially given their failure to  
 produce any Rule 26(a)(1) Initial Disclosures or Rule 26(a)(2) expert disclosures, and  
 their refusal to respond to Defendants' damage requests in discovery.

27 <sup>5</sup> By email on September 11, 2019, Oppenheimer Defendants confirmed with Plaintiffs  
 28 that they never received Plaintiffs' Rule 26(a) Initial Disclosures. *See* Puri Decl. at ¶ 8.  
 In response, Plaintiffs had no explanation as to why they never served their Initial  
 Disclosures. *See id.*



1 damages against any of the Oppenheimer Defendants. More specifically, on February 16,  
 2 2018, Plaintiffs David Grober and Voice International, Inc. were served with a set of  
 3 interrogatories by Defendant OPEL. Among other interrogatories served on Plaintiffs,  
 4 Plaintiffs were each asked to describe the basis of all of their damage claims against each  
 5 Defendant. The full text of Defendants' Interrogatory is shown below (*see* Puri Decl. at ¶  
 6 9, **Exhibits C and D**):

7 **INTERROGATORY NO. 13:** Describe all bases for Plaintiffs'  
 8 damages claims against each Defendant, including, but not limited to,  
 9 each legal theory under which damages are sought and evidence in  
 10 support of each such legal theory, and calculations supporting all  
 11 damages that Plaintiff's claim.

12 On March 22, 2018, Plaintiffs served their objections and responses to OPEL's  
 13 interrogatories. In response to the above-quoted Interrogatory No. 13, Plaintiffs insisted  
 14 that this interrogatory was somehow "premature" and that Plaintiffs did not have "all [of]  
 15 the facts to complete its damages analysis," as reflected in their response below:<sup>6</sup>

16 **RESPONSE TO INTERROGATORY NO. 13:** Plaintiff objects to  
 17 this interrogatory as *premature*, in that fact discovery is ongoing and  
 18 *Plaintiff does not yet have all the facts to complete its damages*  
 19 *analysis*. Plaintiff expects to fully supplement this response.

20 *See* Puri Decl. at ¶ 10, **Exhibits E and F**.

21 Plaintiffs of course had no excuse for refusing to answer Interrogatory No. 13 since  
 22 the Oppenheimer Defendants had completed their document production well before  
 23 Defendants' interrogatories were served. *See id.* at ¶ 6. In fact, as discussed above,  
 24 Oppenheimer Cine Rental had already produced all of its requested sales record to  
 25 Plaintiffs almost two years prior to Plaintiffs' quoted response to Defendants'  
 26 Interrogatory No. 13. *See id.* at ¶ 6.

27  
 28 <sup>6</sup> Plaintiff Grober and Voice International, Inc. served identical responses to Interrogatory No. 13. *See* Puri Decl. at ¶ 10.

1 On April 11, 2018, Defendants wrote to Plaintiffs about the deficiencies in their  
 2 discovery responses, asking them to immediately supplement their response to  
 3 Interrogatory No. 13. Puri Decl. at ¶ 12, **Exhibit G**. In response, Plaintiffs stood again  
 4 by their objections stating that they “previously and accurately responded” to  
 5 Interrogatory No. 13. *See id.*, **Exhibit H**. Yet, to date, *Plaintiffs have never*  
 6 *supplemented their response to Interrogatory No. 13. See id.*

7 In addition, Plaintiffs never served a damage expert written report as required  
 8 under Fed. R. Civ. P. 26(a)(2), which was due on August 7, 2017. *Id.* at ¶ 13.  
 9 Consequently, Plaintiffs have never disclosed any information in support of their damage  
 10 claim against the Oppenheimer Defendants, including any theories, calculations and  
 11 evidence that they may rely upon to prove damage at trial against any of the  
 12 Oppenheimer Defendants.

13 In fact, nearly four-years after filing this lawsuit, and with trial less than a month  
 14 away, Plaintiffs apparently still do not know which theory (or theories) of damage they  
 15 are pursuing against the Oppenheimer Defendants, as they have received conflicting  
 16 information from the Plaintiffs over the past week about which theories of damage  
 17 Plaintiffs intend to present to a jury. *See* Puri Decl. at ¶ 14. Specifically, on September,  
 18 3, 2019, Plaintiffs served a proposed jury instruction which included an instruction  
 19 seeking only a lost profits award. *See id.* One week later, on September 9, 2019, a week  
 20 after the deadline had passed to serve proposed jury instructions, Plaintiffs sent the  
 21 Oppenheimer Defendants a “revised” set of jury instructions (without leave of court)  
 22 containing instructions seeking a reasonable royalty award (along with a lost profits  
 23 award). *See id.*

### 24 **III. ARGUMENT**

25 A motion *in limine* is a procedural mechanism to limit in advance testimony or  
 26 evidence in a particular area. *United States v Heller*, 551 F.3d 1108, 1111-12 (9<sup>th</sup> Cir.  
 27 2009). Motions in limine serve to “streamline trials and settle evidentiary disputes in  
 28 advance, so that trials are not interrupted mid-course for the consideration of lengthy and



1 complex evidentiary issues.” *Ellis v. Navarro*, 2012 U.S. Dist. LEXIS 116491, at \*4  
 2 (N.D. Cal. Aug. 17, 2012) (citation omitted).

3 FRCP 26(a)(1) requires three separate categories of disclosures, including a  
 4 “computation of each category of damages claimed by” a party. Fed. R. Civ. P.  
 5 26(a)(1)(A)(iii). “Plaintiff should provide its assessment of damages in light of the  
 6 information currently available to it in sufficient detail so as to enable each of the  
 7 multiple Defendants in this case to understand the contours of its potential exposure and  
 8 make informed decisions as to settlement and discovery.” *See Frontline Med. Assoc. v.*  
 9 *Coventry Health Care*, 263 F.R.D. 567, 569 (C.D. Cal. 2009). A computation of  
 10 damages requires “some analysis” including at a minimum the time period for which the  
 11 Plaintiffs are claiming damages, their computation of lost profits and a description of  
 12 expenses. *See id.* There are limited exceptions. “Plaintiff’s precise method of  
 13 calculation need not be disclosed to the extent the method is ***properly the subject of***  
 14 ***expert testimony and the parties will be turning over expert evidence in the future.***”  
 15 *See id.* (emphasis added). “Once document production has been substantially completed,  
 16 however, Plaintiffs will have to provide more detailed disclosure of their calculations  
 17 ***either by way of Rule 26 disclosure or through interrogatory responses.***” *See City and*  
 18 *County of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 222 (N.D. Cal. 2003)  
 19 (emphasis added), *cited in Frontline Med. Assoc.*, at 570.

20 “If a party fails to provide information or identify a witness as required by Rule  
 21 26(a) or 26(e), the party is not allowed to use that information or witness to supply  
 22 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially  
 23 justified or is harmless.” Fed. R. Civ. P. 37(c)(1). “In addition to or instead of this  
 24 sanction, the court on motion and after given an opportunity to be heard: (A) may order  
 25 payment of the reasonable expenses, including attorney’s fees, caused by the failure; (B)  
 26 may inform the jury of the party’s failure; and (C) may impose other appropriate  
 27 sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).” *See id.*  
 28

1 Rule 26(e) provides that a “party who has ... responded to an interrogatory ...  
 2 must supplement or correct its disclosure or response: (A) in a timely manner if the party  
 3 learns that in some material respect the disclosure or response is incomplete or incorrect,  
 4 and if the additional or corrective information has not otherwise been made known to the  
 5 other parties during the discovery process or in writing.”

6 Plaintiffs, as the alleged patent owner, bear the burden of proof with respect to all  
 7 damage claims, including as to any claim for lost profits or a reasonable royalty. *Grain*  
 8 *Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341, 1349 (Fed. Cir. 1999); *Lucent*  
 9 *Tech., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2013). Lost profits cannot be  
 10 awarded to a patentee unless the patent holder can prove infringement and that there is a  
 11 reasonable probability that the patentee would have made the infringer's infringing sales  
 12 "but for" the infringement. *DSU Med. Corp. v. JMS Co., Ltd.*, 296 F. Supp. 2d 1140,  
 13 1148 (N.D. Cal. 2003) (citing *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573,  
 14 1577 (Fed. Cir. 1989)). “But for” causation requires “reliable economic evidence” based  
 15 on “sound economic proof of the nature of the market and the likely outcomes with  
 16 infringement factored out of the economic picture.” *Grain Processing Corp.*, 185 F.3d at  
 17 1350. Similarly, the economic evidence or analysis or calculations must be sufficient to  
 18 guide a fact-finder in determining the measure of Plaintiffs’ lost profits. *Linear Tech.*  
 19 *Corp. v. Micrel, Inc.*, 2006 U.S. Dist. LEXIS 96860, at \*262 (N.D. Cal. 2006) (excluding  
 20 expert testimony on patent damages “as unreliable because (1) the calculations are not  
 21 based upon sufficient facts or data and (2) the calculations are not the product of reliable  
 22 principles and methods”).

23 The Federal Circuit has enumerated the following four-part "Panduit test" that  
 24 must be met in order for the patentee to be awarded lost profits: (1) demand for the  
 25 patented product, (2) absence of acceptable noninfringing substitutes, (3) manufacturing  
 26 and marketing capability to exploit the demand, and (4) the amount of profit the patentee  
 27 would have made. *Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156  
 28 (6th Cir. 1978); *Calico Brand, Inc. v. Ameritek Imps., Inc.*, 527 Fed. Appx. 987, 995

1 (Fed. Cir. 2013). A patentee is not entitled to lost profits “if the patentee fails to establish  
2 any of the [Panduit] requirements.” *Vnus Med. Techs., Inc. v. Diomed Holdings, Inc.*,  
3 2007 U.S. Dist. LEXIS 80863, \*4 (N.D. Cal. 2007), citing *SmithKline Diagnostics, Inc. v.*  
4 *Helena Laboratories Corp.*, 926 F. 2d 1161, 1165 (Fed. Cir.1991) (emphasis added).

5 A reasonable royalty is “merely the floor below which damages shall not  
6 fall.” *Bandag, Inc. v. Gerrard Tire Co.*, 704 F.2d 1578, 1583 (Fed.Cir.1983). Two  
7 approaches have been adopted for calculating a reasonable royalty. The first, the  
8 analytical method, focuses on the infringer's projections of profit for the infringing  
9 product. See *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 899 (Fed. Cir. 1986)  
10 (describing the analytical method as “subtract[ing] the infringer's usual or acceptable net  
11 profit from its anticipated net profit realized from sales of infringing devices”). The  
12 second, more common approach, called the hypothetical negotiation or the “willing  
13 licensor-willing licensee” approach, attempts to ascertain the royalty upon which the  
14 parties would have agreed had they successfully negotiated an agreement just before  
15 infringement began. See *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp.  
16 1116, 1120 (S.D.N.Y.1970); *Radio Steel & Mfg. Co. v. MTD Prods., Inc.*, 788 F.2d 1554,  
17 1557 (Fed.Cir.1986) (“The determination of a reasonable royalty, however, is based not  
18 on the infringer's profit, but on the royalty to which a willing licensor and a willing  
19 licensee would have agreed at the time the infringement began.”);

20 In this case, Plaintiffs have failed to provide any Rule 26(a)(1) Initial Disclosures,  
21 including any computation of damages of lost profits or a reasonable royalty, as required  
22 under Rule 26(a)(1), and they failed to respond and/or supplement their response to  
23 Defendants’ interrogatory seeking the basis of Plaintiffs’ damage claim, and an  
24 identification of all evidence and theories that Plaintiffs intend to rely upon at trial for  
25 damages, in clear violation of Rule 26(e). At the same time, Plaintiffs have never  
26 produced any damage expert report, and have never disclosed or identified any evidence,  
27 testimony, or information (such as an expert report) that would support a finding that any  
28 of the four Panduit factors have been met; that Plaintiffs would have profited “but for”

1 Defendants' alleged infringement; or that Plaintiffs are entitled to any reasonable royalty  
2 under either the analytical method or the hypothetical negotiation approach. Plaintiffs  
3 have also never provided any economic evidence or analysis or calculations to guide a  
4 fact-finder in determining the measure of any lost profits or royalty. Similarly, in the  
5 same vein, Plaintiffs never disclosed or identified any evidence, testimony, or expert  
6 opinion to determine a demand for the patented or the availability of noninfringing  
7 substitutes, and adamantly refused to answer Defendants' interrogatory seeking the basis  
8 of their damage claim (including any evidence or damage theories that they might assert)  
9 against any of the Oppenheimer Defendants.

10 Accordingly, under FRCP 37, Plaintiffs should be precluded from presenting any  
11 argument, evidence or witness at trial on any damage theory due to their complete failure  
12 to disclose any damage contentions or evidence during discovery or otherwise. If they  
13 intended to seek damages, Plaintiffs have no excuse for failing to provide their damage  
14 contentions and evidence from the Oppenheimer Defendants. This case has been pending  
15 for nearly four-years; Plaintiffs have had Oppenheimer Cine Rental's sale records for  
16 more than three and one half-years; and Plaintiffs have had every opportunity to disclose  
17 their damage theories and evidence as part of their Initial Disclosures and before  
18 discovery closed. At the same time, the Oppenheimer Defendants would clearly be  
19 prejudiced if Plaintiffs were now allowed to introduce their damage theories, calculations  
20 and evidence for the first time shortly before trial.

#### 21 **IV. Conclusion**

22 For the foregoing reasons, the Oppenheimer Defendants respectfully request this  
23 Court preclude Plaintiffs from presenting any argument, evidence or witness at trial on  
24 the issue of damages against the Oppenheimer Defendants. In addition, the Oppenheimer  
25 Defendants respectfully request that this Court impose monetary sanctions on Plaintiffs  
26 for the fees and cost associated with preparing this motion *in limine* and responding to  
27 Plaintiffs' multiple versions of jury instructions with inconsistent instructions on  
28 Plaintiffs' proposed damage awards.

1 Dated: September 16, 2019

FOX ROTHSCHILD LLP

2  
3 By: /s/ Ashe P. Puri

4 James E. Doroshow

Ashe P. Puri

5 Attorneys for Defendants OPPENHEIMER

6 CINE RENTAL, LLC; OPPENHEIMER

7 CAMERA PRODUCTS, INC.; MARTY

8 OPPENHEIMER  
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